"A plaintiff instituting a suit for specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly."

This section speaks implicitly that "if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled"; it makes no reference at all to any transfer executed by a contracting party in favour of a third person. We agree with the submission of learned counsel for the appellants that this section does not empower the learned judge to order the cancellation of the transfer executed by the 2nd appellant to the 3rd appellant. We are doubtful whether the learned judge has jurisdiction to make such a summary order under Order 81 of the Rules of the High Court 1980 and without hearing full argument on the matter, we prefer to keep this point open for future decision. On the other hand, the court appears to have the jurisdiction and power to make such an order under section 26(b) of the Act but in our opinion, it should only do so after a trial and subject to the conditions contained therein [see *Ong Chat Pang & Anor.* v. *Valliappa Chettiar*[1]]. It seems to us that since the exercise of the equitable remedy of specific performance is conditional on the learned judge making an order under section 26(b) of the Act and in view of the unsatisfactory manner the facts were presented in the court below where the long delay and non-execution of the Memoranda of Transfer and Charge had not been explained, we think the proper order to make is to set aside the whole of the Order of the learned judge and give leave to the appellants to defend the action. The appeal is allowed with costs here and below to be taxed. The deposit to be refunded to the appellants. We further direct that the hearing of this action should be expedited.

*Appeal allowed.*

Solicitors: *Skinner Lind Robertson Pang & Willie; Joseph Lee & Co.*

## WOON KIM POH v. SA'AMAH BT. HJ. KASIM

**[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) November 18, 1985 & October 26, 1986]**

**[Johor Bahru – Supreme Court Civil Appeal No. 251 of 1984]**

*Land Law – Caveat lodged against land – Transfer registered while caveat was still in force – Order of Court – National Land Code, ss. 322(2), 340 & 417.*

The respondent in this case had entered into an agreement with a development company for a joint venture in a housing project on a piece of land belonging to her. Pursuant to the agreement the respondent transferred the land to the company. It was a term of the agreement that a certain sum was to be paid by a certain date and the company should apply for conversion and subdivision of the land within a set period. The respondent alleged that the company had failed to honour its obligations under the agreement and she invoked the provision in the agreement imposing on the company a contractual duty to transfer back the land to her. She lodged a caveat against the land and this caveat was extended. While the caveat was still in force the company transferred the land to the appellant and the transfer was registered. The Registrar claimed that he was acting under an order of the High Court. The respondent applied for the registration of the transfer to be cancelled or be declared null and void. The question was whether the Registrar was correct in law in registering the transfer whilst the said caveat was still in force. The learned trial judge gave judgment in favour of the respondent and the appellant appealed.

**Held**: (1) the Registrar had misconstrued the order of court in this case. The court order was in effect a direction to the Registrar for the removal of the three caveats (not including the caveat lodged by the respondent) and not a direction to register the transfer;

(2) in the Torrens System where registration is the very basis of the system the prohibition in section 322(2) of the National Land Code, which prohibits registration, endorsement or entry on the register document of title of any instrument of dealing so long as a caveat is in force, must be strictly complied with. The Registrar is statutorily obliged to refuse the registration because to do so would be a violation of an expressed provision of the National Land Code;

(3) the appellant cannot claim the protection of section 340 of the National Land Code by the default of the Registrar to observe the statutory prohibition of section 322(2) of the Code.

*Cases referred to:*

(1) *Templeton* v. *The Leviathan Proprietary Ltd* (1921) 30 C.L.R. 34.
(2) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212.
(3) *Sungai Biak Tin Mines Ltd.* v. *Saw Choo Theng & Anor. (No. 2)* [1970] 2 M.L.J. 226.
(4) *Damodaran* v. *Choe Kuan Him* [1979] 2 M.L.J. 267.

SUPREME COURT.

*P.K. Nathan* (*R. Muthu* with him) for the appellant.

*Ho Thian Cheh* for the respondent.

*Cur. Adv. Vult.*

**Hashim Yeop A. Sani S.C.J.** (delivering the Judgment of the Court): This is an appeal against the decision of Zakaria Yatim J. who allowed the application of the respondent in the terms of her notice of motion. The notice of motion dated July 28, 1984 sought for a number of orders the main one being that the registration of the transfer executed in favour of the appellant in respect of land comprised in Geran Mukim 298 Lot 3804 in the Mukim of Pontian, Johor, be cancelled and/or set aside or alternatively that the registration of the said transfer be declared null and void. In the affidavit supporting the notice of motion reference was made to the background facts which may be summarised as follows. The respondent and Madai Enterprise Sdn. Bhd., a development company, entered into an agreement on January 23, 1979 for joint venture in a housing project on the said piece of land. Pursuant to the agreement the respondent transferred the said land to the company which became the registered proprietor on November 2, 1979. It was a term in the agreement that a certain sum of money was to be paid to the respondent by a certain date. It was also a term of the agreement that the company shall apply for conversion and sub-division of the said land within a certain set period. The respondent in her affidavit alleged that the said company had wilfully and deliberately refused to honour its obligations thereby invoking the provision in the agreement which imposed on the company a contractual duty to transfer back the land to the respondent. In order to protect her interest in the land the respondent lodged a private caveat. On May 5, 1984 she was served with a notice under section 326 of the National Land Code for the removal of the caveat. However her application to have the caveat extended was granted by the court on May 16, 1984.

It was also her allegation in her affidavit that the company had fraudulently transferred the land to the appellant and the transfer was registered on March 10, 1984 while her caveat was still in force. For the purpose of the notice of motion before the learned judge the following essential facts were in fact admitted:-

(1) The respondent lodged a caveat under Presentation No. 20/83, Folio 99, Jilid 7 on the land on March 23, 1983 and this caveat was extended by the court on May 16, 1984.

(2) The transfer dated March 10, 1984 was presented to the Registrar for registration while the caveat was still in force.

The question posed to the learned judge was whether the Registrar (third respondent before him) "was correct in law in registering the said transfer whilst the said caveat was still in force" (page 2 of his judgment).

In his affidavit the Registrar stated that the transfer referred to was accompanied by an Order of the Johor Bahru High Court dated April 24, 1982 and it was therefore not open to him as Registrar to examine "the propriety or otherwise of the said Order" and indeed it would be "imperative" for him to obey the terms of the said Order "for to do otherwise would be an act of contempt" (page 11 of Appeal Record). In short what the Registrar was saying is that he was merely complying with an order of court made under Section 417 of the National Land Code.

Section 417(1) of the Code provides that the court or a judge may by order direct the Registrar or Collector to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Collector to comply with the order forthwith. In *Templeton* v. *Leviathan Proprietary Ltd.*[1] a number of questions were posed before the High Court of Australia and one of the questions was the duty or power of the Registrar of Titles under the Transfer of Land Act 1915 (Vict.) to refuse to register a dealing which he believes on the facts within his knowledge as Registrar to be a breach of trust. What happened in that case was that a transfer from the registered proprietors of undivided shares on a piece of land to a company, a memorandum of first mortgage from the company to the National Mutual Life Association and a memorandum of second mortgage from the company to the transferors were lodged in the Office of Titles for registration and shortly after that date and before any refusal by the Registrar to register these documents a copy of the order of the judge was lodged in support of the application for registration. After an interview with the solicitors for the trustees the Registrar wrote to the solicitors to the effect that he was unable to approve the registration on a number of grounds including that there is no jurisdiction in any court or judge to authorise trustees to invest trust funds on second mortgage.

A few days later the proposed transferors obtained an order *nisi* for a mandamus to the Registrar of Titles directing him to register the transfer and memoranda of mortgage. The order nisi was subsequently made absolute by the judge. From this order the Registrar brought the appeal before the High Court by special leave. It was argued on behalf of the Registrar that the facts within his knowledge as Registrar showed that the transaction was a breach of trust and secondly he was justified in refusing to register the documents. On this Knox C.J. in his judgment at page 53 said:

"What is his duty in such a case? Must he register the dealing, or is he entitled to refuse to register? In my opinion where it has come to the knowledge of the Registrar that a dealing lodged for registration is a breach of trust, or that for any other reason the person dealing with the land as registered proprietor is not competent at law or in equity to deal with it in the manner proposed, it is his duty to refuse to register. I do not suggest nor was it contended that where the Registrar merely suspects that the dealing may be a breach of trust or otherwise improper, but knows no facts to justify him in concluding that it is so, it is any part of his duty, or that he has any right, to ask for information or make inquiries in order to ascertain the true facts. I desire to limit my opinion with regard to his power to refuse registration to those cases in which the facts within his knowledge appear to him to show that the proposed dealing is improper."

Coming back to our case, under Section 322 of the National Land Code so long as a caveat is in force registration, endorsement or entry on the register document of title of any instrument of dealing shall be prohibited. The effect of a private caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. See also *Eng Mee Yong & Ors.* v. *V. Letchumanan.*[2] A caveat freezes the register at least until the caveator has taken court action to determine his claim - Judith Sihombing, page 588. In the Torrens system where registration is the very basis of the system the prohibition in section 322(2) must be strictly complied with. In other words the Registrar is statutorily obliged to refuse the registration because to do so would be a violation of an expressed provision of the National Land Code.

What of the Order of the court referred to by the Registrar? The Order is reproduced in the judgment of the judge but for ease of reference the said Order is reproduced below:

"*BY CONSENT IT IS ORDERED* that Originating Motion 1 of 1982 be consolidated with Originating Motion 2 of 1982 and do proceed as one action *AND IT IS FURTHER ORDERED* that the Respondent in Originating Motion 1 of 1982 and the first respondent in Originating Motion 2 of 1982 undertakes to pay to the Applicant the sum of Ringgit Eight Hundred Thousand (M$800,000-000) only on or before the 30th day of September, 1982 *AND IT IS FURTHER ORDERED* that on receipt of the payment by the Respondents, the Applicant undertakes to deliver titles EMR 831, Lot No. 2111, GM 298, Lot No. 3804 both in the Mukim and District of Pontian, Johore and EMR 1566 Lot No. 74/80 Volume 6, Folio 1 *AND IT IS FURTHER ORDERED* that failure by the Respondents to make payment on or before the said date the Caveat No. 44/81 Volume 6 Folio 95 lodged in respect of EMR 831 Lot 2111, Mukim and District of Pontian, Johore and Caveat No. 43/81 Volume 6 Folio 94 lodged in respect of G.M. 298, Lot No. 3804, Mukim and District of Pontian, Johore and Caveat No. 49/81, Jilid 6 Folio 100 lodged in respect of land held under EMR 1566 Lot No. 1690 in the Mukim and District of Rimba Terjun, Pontian, Johore be removed by the collector forthwith to effect the transfer of the said land into the Applicant's name."

It was a Consent Order concerned with three pieces of land. One of the three pieces was the very same piece of land which is the subject of the dispute *i.e.* Geran Mukim 298, Lot No. 3804 Mukim of Pontian. The Order also specified the three caveats involved. However, Caveat No. 20/83 Folio 99 Jilid 7 was not mentioned.

From the wording of the court Order it is clear that the parties in Originating Motions No. 1 and No. 2 of 1982 had agreed between themselves that on the failure of one party to make a certain payment on or before a certain date, the three caveats referred to in the Order *shall be removed* by the Registrar forthwith *to effect the transfer of the said land.*

First, it is to be noticed that the court Order referred to three caveats but the caveat lodged by the respondent was not included among the caveats specified in the court Order. Secondly, on a proper reading of the court Order the real substance of the Order would appear to be the direction to the Registrar *to remove* the three caveats mentioned in the Order when payment was not made before a certain date as agreed to by the parties. It was not a direction to the Registrar to register the transfer. Thus it is not really a case of allowing anybody "to thumb their noses at a judgment" of a court (to use the words of Suffian F.J. as he then was) in *Sungai Biak Tin Mines Ltd.* v. *Saw Choo Theng & Anor. (No. 2)*[3]. Thirdly, the respondent was not a party to the Consent Order.

Surely, Section 417(1) of the National Land Code does not authorise the making of an order or direction contrary to the National Land Code itself. It does not authorise the court to direct the Registrar to make an entry inconsistent with the scheme of the Code. See also *Damodaran* v. *Choe*

*Kuan Him*[4]. As referred to earlier the court Order in this case was in effect a direction to the Registrar for the removal of the three caveats and not a direction to register the transfer. Therefore the court Order in this case is a perfectly valid Order but which the Registrar had misconstrued.

Finally, the appellant cannot rely on the protection of section 340 of the National Land Code. True section 340 protects the title or interest of any person registered as proprietor and that it is indefeasible and can be defeated only in one of the three ways mentioned in sub-section (2) of section 340 of the Code. It is to be noticed that the notice of motion referred in its heading to Section 418 of the National Land Code under which provision any person aggrieved by any decision of the Registrar may appeal to the High Court provided that such appeal shall be made within three months beginning with the date the decision was communicated to him.

Section 340 must be read together with the other sections of the Code. Section 418 confers on the applicant a statutory right of appeal. An applicant may appeal against any decision of the Registrar. The word "decision" includes any act, omission, refusal, direction or order of the Registrar – section 418(3).

The appellant cannot claim the protection of Section 340 by the default of the Registrar to observe the statutory prohibition of section 322(2) of the Code.

We will accordingly dismiss the appeal with costs.

*Appeal dismissed.*

Solicitors: *Muthu & Co.; Ho Thian Cheh & Co.*

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## LAI YEW SEONG v. CHAN KIM SANG

**[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and George Seah S.C.JJ.) June 16 & November 8, 1986]**

**[Kuala Lumpur – Supreme Court Civil Appeal No. 423 of 1985]**

*Tort – Road accident – Apportionment of liability – Contributory negligence – Duty of driver of vehicle following another – Misdirection both on fact and law – Order of trial court quashed.*

In this case the appellant appealed against the apportionment of liability to the extent of one-third against the appellant and two-thirds against the respondent. The contention of the appellant was that the motor accident was caused solely by the negligence of the respondent and the learned Judge was wrong to find that the appellant was also guilty of contributory negligence. The findings of the learned trial judge were as follows –

"I find from the evidence that the car did give trafficator light signal when it was just over one chain away from where it stopped. I found that there were two motor cycles behind the said car, one of the motor cycles eventually passed on the driver's left while the other knocked into the rear off-side of the said car. I found that the last time or the second time the driver looked into the rear-view mirror was when he was about 2 to 3 chains away from the place where he stopped and that he did not look into it again up to the moment of the collision. I found that the car had stopped to let the oncoming lorry pass the car. I further found that the rider had decided to overtake the said car which was slowing down, and not that the driver had applied emergency brake in stopping suddenly, causing and forcing the rider to swerve to his right to overtake to avoid the collision.

I found the rider negligent in overtaking without ensuring whether it was safe to do so, and that he should have seen the oncoming lorry too in view of the insignificant obstruction of the view in front caused by the small size of the said car which was a Toyota Corolla. He further failed to wait to ascertain first the intention of the driver who had switched on his trafficator light signal before deciding to overtake the said car. He was travelling too close to the said car. The next question was, as to whether the driver was himself guilty of any contributory negligence."

**Held**: (1) negligence as used in the expression "contributory negligence" does not mean breach of duty. It means the failure by a person to use reasonable care for the safety of himself or his property so that he becomes the author of his own wrong. The test of contributory negligence is based entirely on the conduct of the plaintiff in the particular accident or case but the learned judge appeared to have misconstrued the law and applied it wrongly to the defendant;

(2) it is plain that the learned Judge in this case had misdirected himself both on the fact and the law when he was dealing with the respondent's case and contributory negligence. Based on his findings the learned Judge should have found (a) that the respondent was riding his motor-